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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 584

EURUS CADY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee

APPEAL FROM SUPREME COURT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, the appellant submits herewith his statement upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in the above entitled cause.

Opinion in the Court Below

The opinion of the Supreme Court of Georgia has not been officially reported, though it has been filed and a copy thereof is appended hereto. The case is one in which there was no written opinion by the trial court, none being neces-

sary. The verdict of the jury, the sentence based thereon, and an order denying a new trial, are specified in a stipulation, as to the record, filed with the clerk of the Supreme Court of Georgia.

Jurisdiction

This court has jurisdiction under section 237 (a) of the Judicial Code as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (28 U. S. C. A. Section 344a) to review the judgment of the court below upon appeal.

I

The Appeal Is Timely

A judgment of the Supreme Court of Georgia in this cause was entered in the first instance on June 8, 1944. A motion for rehearing was filed on June 17, 1944, and denied on July 18, 1944; but in the interim the opinion as written and filed in the first instance was modified by substituting the statement of fact which formed the first three pages thereof with a new statement of fact. A copy of the first statement of fact is appended to the copy of the opinion which is appended hereto. Application was presented on July 24 for leave to file a second motion for rehearing. Leave to file was denied for the stated reason, concurred in by three justices, that the court has adjourned on July 21. The statutory adjournment period was July 31, although the statute does provide that the court may, by order, adjourn in advance of the statutory adjournment. The application for leave was within the ten days provided for the filing of a motion for rehearing by rule 40 (a). On the same date; namely, July 24, 1944, an application was made for order staying the remittitur for the purpose of allowing time to prepare and present an appeal. An order staying the remittitur for a period of forty days from that date was

entered. Said order was subsequently enlarged to fifty days, and on this the 6th day of September a petition for the allowance of an appeal was presented to Hon. R. C. Bell, Chief Justice of the Supreme Court of Georgia, who allowed the same, on said date and ordered that a certified transcript of the record, proceedings, and judgment as specified in the stipulation filed, be transmitted to the Supreme Court of the United States within forty days from the date; namely, September 6, 1944, and that the remittitur be stayed pending the appeal. On the same date, Hon. R. C. Bell, Chief Justice as aforesaid caused citation to be issued, directed the State of Georgia, citing the State of Georgia be and appear at the Supreme Court of the United States in Washington, D. C. within forty days from the date thereof; to wit, 40 days from September 6, 1944, to show cause, if any there be, why the judgment and sentence rendered against the appellant, should not be corrected, which citation was served upon the appellee by service upon T. Grady Head, Attorney General of Georgia, D. W. Bennett, Solicitor General of the Waycross judicial circuit, and D. C. Sapp, attorney, on September 7, 1944.

II

The validity of two state statutes under the Federal Constitution was drawn into question, and the decision of the Supreme Court of Georgia was favorable to the validity of each.

(a)

Section 59-106 of the Code of Georgia reads as follows: Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists. The jury commissioners shall se-

lect from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1877, p. 31; 1892, p. 61; 1899, p. 44.)

(b)

Code section 38-1604 reads as follows: Husband and wife as witnesses against each other in criminal proceedings. —Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife shall be a competent witness to testify for or against her husband in cases of abandonment of his child, as provided in section 74-9902. (Acts 1866, p. 139; 1880-1, p. 121; 1927, p. 145.)

III

Nature of the Case

("R" followed by numerals indicates pages of transcript of record of Supreme Court of Georgia.)

At the October term 1942 of the Superior Court of Coffee county, Georgia a special presentment was returned by the

grand jury then and there sitting, charging and accusing the defendant, now the appellant, with murder. (R. p. 1.)

The defendant, now appellant, entered his plea of not guilty. (R. p. 2) The case came on for trial and he filed his written challenge to the array of jurors, charging their improper selection, and that Code section 59-106 of Georgia has been misinterpreted so as to exclude women from juries ever since August 26, 1920, the effective date of the XIXth amendment to the Constitution of the United States, and that such misinterpretation and the exclusion of women from juries for the reasons therein alleged deprived him of his liberty without due process of law, and denied to him the equal protection of laws, all guaranteed by the XIVth amendment to the Constitution of the United States. (R. pp. 3-15) Evidence on the challenge was uncontradicted that there were women otherwise qualified excepted by their sex as jurors in Coffee county, Georgia. (R. pp. 15-19) The challenge was denied. (R. p. 19) Exception pendente lite presented, certified, and filed. (R. pp. 20-35)

During the trial and before the evidence closed, defendant offered as a witness his wife, Mrs. Eurus Cady. Objection was made that she was incompetent under section 38-1604 of the Code of Georgia. (Transcript of record Supreme Court of Georgia p. 35). It was thereupon stated into the record what her testimony would be if she were permitted to testify. (R. pp. 25-38). Thereupon the court refused to permit the testimony. (R. p. 38). Exception pendente lite was presented, certified and filed. (R. pp. 34-39).

The defendant was convicted. (R. p. 2).

A motion for new trial was filed (R. p. 40) and amended. Ground one of the amended motion assigned error on the denial the challenge to the array, and, as in the written challenge, charged that in the pretended performance of their duties the jury commissioners of Coffee county,

Georgia had misinterpreted Code section 59-106; and in so doing had deprived defendant of his liberty without due process of law, and denied to him the equal protection of laws all as guaranteed by the XIVth amendment to the Constitution of the United States (R. pp. 43-52).

Ground nine of the amended motion assigned error on the refusal to permit the wife to testify, averring that so to do had deprived the defendant of the equal protection of laws and due process of law guaranteed him by the XIVth amendment to the Constitution of the United States and guaranteed him by Article 1, Section 1, Paragraph III of the Constitution of Georgia (R. pp. 52-59).

The grounds of motion for new trial, as amended, were approved. (R. p. 59).

The motion for new trial, as amended, was overruled (R. p. 60-65).

Bill of exceptions was signed and certified, (R. p. 62-67) and the case carried to the Supreme Court of Georgia for review.

The Bill of exceptions was amended (R. p. 67).

The Supreme Court of Georgia affirmed the judgment of the lower court, holding that the challenge was without merit; and that the refusal of the lower court to permit the wife to testify for or against her husband was likewise without merit. The opinion is set forth in the transcript of the record of the Supreme Court of Georgia. (R. pp. 70-92).

The appellant, within the time required by the rules of the Supreme Court of Georgia, filed his motion for a rehearing on the 17th day of June, 1944 (R. pp. 92-113). The motion for rehearing was denied on July 18, 1944 (R. p. 113).

On July 24, 1944, appellant presented his application for leave to file a second motion for rehearing; (R. pp. 114-118) the filing of which was refused by justices J. J. Jenkens,

P. J., and Grice and Duckworth, J. J. for the reasons stated in a letter returning the same that the Supreme Court had adjourned its April session on July 21 by order, (R. p. 118) whereas the statutory adjournment period would have been July 31.

A stay of remittitur was on July 24, 1944, allowed for forty days from that date, and the order subsequently enlarged to fifty days.

IV

Federal Questions Were Properly Raised and Decided Adversely to the Appellant

The federal questions raised by the appellant in his challenge to the array were:

(a) That by the misinterpretation of section 59-106 of the Code of Georgia; and by consistently, wilfully, systematically, arbitrarily, and intentionally refusing and failing to select the name or names of any female, otherwise qualified, as jurors, notwithstanding, there were such in the county who were free-holders and experienced, upright, and intelligent citizens, abridged the defendant's privileges or immunities and deprived him of his liberty without due process of law, and denied to him the equal protection of the laws all guaranteed by the XIVth amendment to the Constitution of the United States.

(b) That by the denial of the right of the wife of the defendant to testify after it had been stated into the record what her testimony would be and that it was material to the defense of the defendant, and the holding by the Supreme Court that section 38-1604 of the Code of Georgia had deprived the appellant of equal protection of the laws and due process of law guaranteed him by the XIVth amendment to the Constitution of the United States and guaranteed to

him by Article 1, Section 1, Paragraph III of the Constitution of Georgia.

Said questions were raised by the appellant, in the first instance, by his written challenge to the array; preserved by exception pendente lite, as hereinbefore set forth, and in the second by exception pendente lite to the refusal of the lower court to permit, the wife of appellant to testify, by ground nine of his amendment to motion for new trial and preserved in the bill of exceptions to the Supreme Court of Georgia.

The Supreme Court of Georgia actually passed on the federal questions raised in the court below by the appellant, and decided said questions adversely to him.

Both the Trial Court and the Supreme Court of Georgia held that the section 59-106 which is as follows:

Revision of Jury Lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as grand juror shall be drawn as a traverse juror, such name shall

be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1892, p. 61; 1899, p. 44.): and

Section 38-1604 which is as follows:

Husband and wife as witnesses against each other in criminal proceedings.

—Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife shall be a competent witness to testify for or against her husband in cases of abandonment of his child, as provided in section 74-9902. (Acts 1866, p. 139; 1880-1, p. 121; 1927, p. 145);

were not violative of the constitutional provisions as urged by the appellant, to wit: the XIV Amendment, as follows:

1-815. (6700) Citizenship. (Section 1.) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, and

The XIX Amendment, as follows:

1-827. Equal suffrage. (Section 1.) The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

1-828. How Article enforced. (Section 2.) Congress shall have power to enforce this article by appropriate legislation.

Accordingly, the Supreme Court of the United States has jurisdiction upon appellant to refuse the judgment of the Supreme Court of Georgia.

V

Appeal Is From a Final Judgment of the Highest Court of the State of Georgia—The Supreme Court of Georgia

The judgment of the Supreme Court of Georgia directs that the judgment of conviction in the lower court be affirmed. It is final both in form and substance, the Supreme Court of Georgia being the highest court of the State of Georgia.

VI

The Federal Questions Presented Are Substantial and Vital, and Were Actually Passed On by the Supreme Court of Georgia.

We do not find with our limited facilities, any case in point or parallel with the case at bar, on either of the questions presented:

1. Whether the selection of a jury in the manner and form pointed out by the record and under the provisions of section 59-106 of the State of Georgia, quoted above, is violative of the XIXth Amendment to the Constitution of the United States, quoted above, and whether or not such a selection deprived the appellant of the rights guaranteed to him under the XIVth Amendment of the Constitution of the United States, quoted above.

The decision of the Supreme Court of Georgia in this case cites *Rawlins* v. *State*, 124 Ga. 31 (1) which was affirmed

by United States Supreme Court, 201 U. S. 638, as authority for that the challenge to the array of jurors and particularly subparagraph (R. pp. 3-15) was without merit.

The challenge in the *Rawlins* case was to the array of grand jurors—and because the jury commissioners had excluded from the grand jury, all lawyers, ministers, doctors, dentists, railroad engineers and firemen, there being ten or other large number of each class in the county, who were citizens and residents, and possessed the qualifications required by law for grand jurors, and there being upon neither the grand-jury list nor in the grand-jury box any member of any of such classes. It was contended that the arbitrary exclusion of all of these classes without reference to their qualifications was a violation of the statute and constitution of this State, and especially that provision of the constitution which grants to every one due process of law, and that it was also in violation of the fourteenth amendment to the constitution of the United States, as well as of other provisions of that instrument, and had the effect to deny to the accused due process of law, as well as equal protection of the law, and abridged their privileges and immunities as citizens of the United States.

On demurrer this challenge was stricken, and the grand jury ordered to retire and enter upon a consideration of the case.

The court said; (p. 39) "All of the classes that were alleged to have been excluded from the jury-box in the present case belonged to either one or the other of the classes above referred to. They were either exempt, or their business was of such a character that it was reasonably certain that the judge would excuse them from service. There was no averment in the challenge that the exclusion was due to fraud or any improper motive. There was no suggestion that either the grand or traverse jurors drawn for service did

not possess the qualifications required by law. There was no objection to any of the jurors that were on either list. The sole objection was that the list was deficient in number."

So, that case was not authority for the decision in the case at bar, wherein it is charged that "The Jury Commissioners of Coffee County, * * * have, ever since August 26, 1920, the effective date of the XIXth Amendment to the Constitution of the United States, in the pretended performance of the duties imposed on them by Section 59-106 of the Code of Georgia, misinterpreted said section of the Code, and as a result of such misinterpretation of said section of the Code have consistently, wilfully, systematically, arbitrarily, and intentionally refused and failed to select from the books of the tax receiver the name or names of any female or females, residents of said County, otherwise qualified to serve as jurors, notwithstanding the fact that the books of such tax receiver contain and have contained at all times since said date the names of many females who were and are free holders, and are experienced, intelligent and upright citizens.

The XIXth Amendment to the Constitution of the United States provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Such failure and refusal of said jury commissioners to select the name or names of any female or females and to place such females' or female's name or names in the jury box abridges defendant's privileges and/or immunities, deprives defendant of his life or his liberty without due process of law, and denies to defendant the equal protection of laws, all guaranteed him by the XIVth Amendment to the Constitution of the United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of laws the equal protection of laws." Defendant now claims special titles, rights, privileges, or immunities guaranteed him by the above named and quoted provisions of the Constitution of the United States and says that he is a citizen of the United States entitled to the protection of all of such provisions of its Constitution, that he is peculiarly interested in, and would be particularly injured by, the enforcement or denial of such titles, rights, privileges, or immunities, inasmuch as the alleged murder of which he is accused, for which he stands indicted, and on which bill of indictment the State of Georgia is now seeking to try him for his life by the panel of jurors about to be put upon him was a homicide occasioned because it was necessary for defendant to kill to save his wife's life, and that she is entitled to have females as well as males in the panel from which the jury will be chosen to return a verdict determining the existence or nonexistence of such necessity.

In said challenge it is also charged that: "Any interpretation of Section 59-106 of the Code which does not give to the word "men" appearing therein its basic, primary, or generic meaning, that is to say, any interpretation of the word "men" appearing in said section of the Code which does not include females as well as males within the interpretation of the word "man" appearing in said section of the Code, or which excludes females from the meaning given to said word "man" as said word appears in said section of the Code, whether such interpretation or construction be placed thereon by the jury commissioners or by the Courts deprives defendant of rights guaranteed him by the XIXth and by the XIVth Amendments to the Constitution of the United States and defendant now claims special rights, titles, privileges, or immunities under said

Amendments to the Constitution of the United States. Such interpretation would exclude females from jury service. Defendant, a citizen of the United States, shows that such exclusion would and does deprive him of liberty or property without due process of law, and would and does deny him the equal protection of laws, all of which are guaranteed him by said XIVth Amendment and that he is and would be directly injured by the denial of said rights so guaranteed him because the alleged murder of which he is accused, for which he stands indicted, and on which bill of indictment the State of Georgia is now seeking to put him to trial and put upon him a panel of jurors from which and on which it was impossible for a female's or females' name to appear, was a homicide, justified partly because it was necessary for defendant to shoot to save his wife's life."

Other cases cited as authority for the decision on this question are: *Powers* v. *State*, 172 Ga., (4) is a headnote decision without elaboration and is as follows:

"Under our law as it stands, females are not subject to jury duty, it being provided in the act of the General Assembly approved August 13, 1921 (Acts 1921, p. 106), that 'females shall not be liable to discharge any military, jury, police, patrol, or road duty.' And this law is not obnoxious to the nineteenth amendment to the constitution of the United States, which reads as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex.' This amendment to the constitution does not contemplate that the State shall be required to place the names of females in the jury-box."

It is not disclosed how the point was raised, and obviously there was no challenge equivalent to illegality or fraud as in the case at bar.

Griffin v. *State*, 183 Ga., 775-777: "It is a well-known axiom of the law that this court will not consider a constitu-

tional attack upon an act where the party attacking the same 'does not allege any injury accruing to him by the enforcement of the act,' and 'A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it,' and 'a party must be prejudiced by the enforcement of a statute, or the courts will not listen to an objection by him to its constitutionality.' "

So, this case is likewise not authority for the holding that "the challenge to the array as set forth in subsection (b) thereof is without merit."

1. Whether the refusal to permit the wife to testify and thereby holding that section 38-1604 did not deprive appellant of the rights guaranteed him under the XIVth Amendment to the Constitution of the United States, quoted above.

The opinion in the case of *Melton* v. *State,* 180 Ga. 104 (1) cited by the Supreme Court of Georgia as authority for holding that the wife was not a competent witness to testify for or against her husband, embodies citations from United States cases, one of which was *Mobile, etc., Railroad Company* v. *Turnipseed,* 219 U. S. 35 (31 Sup. Ct. 136, 55 L.E.D. 78, 32 L.R.D. 226, Ann. Cas. 1912, 436) in which this principle is laid down.

(P. 106) "If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The converse of this principle should be held to be true, i. e.

'If a legislative provision is unreasonable in itself, if it prescribe a rule of evidence, in either criminal or civil

cases, which does shut out from the party affected a reasonable opportunity to submit to the jury, in his defense, all of the facts bearing upon the issue, there is ground for holding that due process of law has been denied him;' and this statement of principle applied to the case at bar would be equally sound when used as a test for violation of the Federal Constitution, as it has only to do with due process and equal protection of law.

In the *Melton* case, *supra,* the defendant challenged the Section (then 1037 par. 4—now 38-1604) as unreasonable, contrary to public policy, and violates (violative of) the due process and equal protection clauses of the State and Federal Constitutions."

The court held (p. 105) "There is no merit in any of these contentions.", and further *"If the statute is not void upon constitutional grounds, it can not be said that it is either unreasonable or contrary to public policy,* (underscoring ours—for emphasis) and also "A constitutional statute can not be declared inoperative because opposed to public policy, since the statute itself determines public policy," also at p. 108 the court held: "We have stated that the wife's incompetency is a matter of statute in this State. While it is true that the rule as applied in this case is identical with the common law, it is not merely in virtue of the common law that rule exists in this jurisdiction. By legislative action it has been given the force of a specific statute, and as such it is binding upon courts, *in the absence of valid constitutional objection."* (Underscoring ours—for emphasis.)

The case at bar is distinguished in that it is an attack upon the statute upon definite constitutional grounds which are specifically laid—(See R. 34-39 and 52.)

The Supreme Court of the United States has jurisdiction on appeal to determine whether a State statute as

construed and applied to the facts of a particular case by the highest court of the State is in conflict with the Federal constitution, for the application of the statute affirms its validity as so applied. *Fiske* v. *Kansas*, 274 U. S. 380.

Conclusion.

Wherefore, it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of the Supreme Court of the United States.

HARRY M. WILSON,
E. L. GRANTHAM,
R. A. MORSE,
Attorneys for the Appellant.

APPENDIX "A"

FIRST STATEMENT OF FACT BY SUPREME COURT

No. 14842

SUPREME COURT OF GEORGIA

Decided June 8, 1944

CADY v. THE STATE

BY THE COURT:

The verdict was authorized by the evidence; and none of the special grounds of the motion for new trial, which are dealt with in the opinion, authorize the setting aside of the verdict returned by the jury.

The defendant, Eurus Cady, was convicted on an indictment charging him with the murder of Tom Burden with a recommendation for mercy, and was sentenced to life imprisonment. The verdict for murder was authorized but not demanded by the evidence, which in the brief of the law department is summarized as follows: "The evidence in this case shows that the time of the killing, Eurus Cady, the defendant, was fighting with Tom Burden, the man who was killed, both fighting with bare hands. Burden was partly in a kneeling position when Cady drew his pistol and fired the first shot striking Burden and inflicting a minor wound. Whereupon, Burden attempted to flee and while fleeing away from Cady, the latter continued firing and killed him, the fatal bullet striking the deceased while he was fleeing. The eyewitness to the shooting Sylvester Hardwick, testified as to the four shots that were fired by Cady and the actions of the deceased while fleeing from the defendant as the bullet struck him. The testimony of a physician who examined the deceased shortly after the killing, substantiated the contention of the State that the fatal bullet was fired at a time when instead of there being any fighting going on between the two, the deceased had abandoned all combat and was attempting to escape the bullets fired by the defendant." This we think is fairly stated, unless it be that the

use of the word "substantiated" in referring to the testimony of the physician with respect to that of the State's witness Sylvester Hardwick should be taken as inapt. We think a better treatment of the physician's evidence would be to say that it was entirely consistent with the evidence of Hardwick as above formulated by the State's counsel. The homicide occurred outside of a filling station, and the evidence of Hardwick, the only eyewitness to the shooting, was to some extent contradictory, in that on cross examination this witness testified, "I was not outside when the shooting occurred. I was inside long enough to count $3.30 in tips that I had in my pocket * * * and I was not interested in the fight that was going on outside." On cross-examination he also swore: "I didn't see the beginning of the fight, because I had not yet turned around from Mr. Stubbs' car. There were words spoken by them, but I don't know which man spoke or what was said* * * I have been confused and my memory has failed me for the last two months." He was also sought to be impeached by admissions of contradictory statements previously made at the coroner's inquest as follows: "I also made the statement that, 'When they were both on the ground rolling over and over, Mr. Tom had something in his hand, but I couldn't tell what it was,' that is true." There was testimony that a wrench was found on the ground where the scuffling had occurred.

APPENDIX "B"

No. 14842

SUPREME COURT OF GEORGIA

Decided June 8, 1944

CADY v. THE STATE

BY THE COURT:

The verdict was authorized by the evidence; and none of the special grounds of the motion for new trial, which are dealt with in the opinion, authorize the setting aside of the verdict.

Eurus Cady was convicted on an indictment charging him with the murder of Tom Burden. The jury recommended mercy, and he was sentenced to life imprisonment. The verdict was authorized but not demanded by the evidence. Sylvester Hardwick, the only eyewitness, testified for the State in substance that at the time of the killing, Cady was fighting with Tom Burden; that both were fighting with bare hands; that they fell to the ground, still scuffling; that he was on the outside of the building when the scuffling began, and went inside while they were scuffling. "I was inside the building long enough to count $3.30 in change . . . then I went back out. When I came out Mr. Burden was getting up and Mr. Cady was standing up. I saw Mr. Cady shoot Mr. Burden once, and then Mr. Burden sort of turned as if to run, and Mr. Cady shot him again. Mr. Burden staggered and fell to the ground, and Mr. Cady shot him twice more." That at the time the first shot was fired they weren't very far apart, and Burden, who had been down on all fours, was about half standing up, and threw up his hands, and the witness did not see anything in them; that after the first shot, Burden "turned as if to run from Mr. Cady. I would say he had gone four or five feet before the second shot was fired. Mr. Burden whirled and grabbed his side, like a person holding a football. . . . Mr. Cady shot him twice after he fell. There were four shots in all." In another portion of his testimony, he said: "After Mr. Burden was shot, I would say he went fifteen or sixteen feet before he fell." Again he testified: "There was one shot and then a pause, and then the other shots. They were fired one after the other, just like a man would be shooting at something." The homicide occurred outside of a filling station, and Hardwick's testimony was to some extent contradictory, in that on cross-examination he testified: "I was not outside when the shooting occurred. I was inside long enough to count $3.30 in tips that I had in my pocket, . . . and I was not interested in the fight that was going on outside." He was also sought to be impeached by admissions of contradictory statements made at the coroner's inquest, as follows: "I went right on back through the building and goes into the back, that is when I heard the first shots fired. When I first heard the shots

I was at the latrine outside of the building. It is on the opposite side of the building from where the shots were fired.... All the shots I heard was while I was at the latrine. I did not see any of the shots fired." He was also sought to be impeached by his statement at the inquest: "I also made the statement that 'When they were both on the ground rolling over and over, Mr. Tom [Burden] had something in his hand, but I couldn't tell you what it was,' that is true." There was testimony that a wrench was found on the ground where the scuffling had occurred. The physician who examined the deceased shortly after the killing testified that four bullets entered the body: one through the left arm; one through the chest, ranging to the right; one in the neck, which entered just to the left of his Adam's apple and came out just under the right ear; and one ranged down the spine in his back; that "the injury through the neck was, of necessity, the fatal wound;" that the chest wound may have knocked him down but may have left him standing; that the only powder burn he saw on the body was on the neck; and that the neck wound could have been fired by a man on the ground at a man standing above him some distance away. The defendant in his statement said that Burden came to his place of business at about ten o'clock on the night before the homicide, very much under the influence of liquor and continued drinking; that Burden attacked another patron, and three times they had to be separated; that at about four o'clock in the morning Burden went out and got in a patron's car and lay down; that at about five o'clock this patron wanted to leave and finally got Burden out of the car, mad and wanting to fight; that the defendant prevailed on Burden to leave him alone, and Burden then turned on the defendant and struck him with a wrench on the side of the head, knocking him down and leaving a scar an inch and a half long, which he pointed out to the jury; that, as he started to get up, Burden knocked him down again, kicked him, and twisted his foot, and then seeing the defendant's wife standing there and pleading: "Please, Tom, stop—don't do that," he turned the defendant loose and said, "Miss Fatty, I will kill you, too;" and that, as he drew back his hand to strike her, the defendant could see that wrench, and he realized he had to do something

quick to save his and his wife's lives, and pulled his pistol and fired the shots from the ground in rapid succession; and that Sylvester Hardwick wasn't present and didn't see any of it. Dr. T. H. Clark testified for the defendant that he had examined the defendant two or three months before, and found an infection, and a ruptured drum in the right ear, which could have resulted from a blow, or fall of such force and in such manner as would have compressed the air in his ear.

Jenkins, Presiding Justice. 1. The first of the special grounds dealt with a challenge to the array of jurors, the attack being made on several grounds:

(a) "Where a juror is put upon a defendant being tried under an indictment for a criminal offense, and is peremptorily challenged by the defendant, the juror is not so disqualified that he could not again be put upon the defendant at a subsequent trial for the same offense under the same indictment, either because the defendant would thereby be deprived of his full 20 strikes, or because it would deny to him his constitutional right of a fair and equal protection of the laws." Esa v. State, 146 Ga. 17. See also Coleman v. State. 141 Ga. 731; Nixon v. State, 121 Ga. 144, 145 (5). Accordingly, the fact that the panel may have included the names of certain jurors, who had appeared in a panel presented in a previous trial of the defendant, and who had been peremptorily challenged by the defendant, does not constitute a good ground of challenge to the array.

(b) "Under our law as it stands, females are not subject to jury duty, it being provided in the act of the General Assembly, approved August 13, 1921 (Ga. L. 1921, p. 106), that 'females shall not be liable to discharge any military, jury, police, patrol, or road duty.' And this law is not obnoxious to the nineteenth amendment to the constitution of the United States, which reads as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.' This amendment to the constitution does not contemplate that the State shall be required to place the names of females in the jury box." Powers v. State, 172 Ga. 1 (4). See also Rawlins v. State, 124 Ga. 31, affirmed in 201 U. S.

638; Griffin v. State, 183 Ga. 775, 777. Accordingly, the challenge to the array as set forth in subsection (b) is without merit.

(c) The challenge to the array of a second panel of jurors after the first panel of forty-eight had been exhausted is not good on the ground that the striking of jurors cannot proceed until a second full panel of forty-eight jurors has been completed In McGuffie v. State, 17 Ga. 497 (4), it was held that: "It is within the discretion of the court to determine the number of which the panel of tales jurors shall consist in capital cases, and the number of panels which may be at the same time summoned." See also Cason v. State, 134 Ga. 786. Accordingly, this ground of objection is without merit.

(d) The defendant complains that the panel of jurors was an illegal panel, because there were no properly selected jurors in the jury box from which a panel could have been selected, since the tax commissioner did not supply to the jury commissioners the names on the list going into the jury box; and for the further reason that the law requires the jury commissioners to be supplied by the tax receiver with the names; and for the repeated reason that there were no women jurors on the list. Section 59-106 of the Code provides that "Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists. The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors." We agree with the State's counsel that "what is meant by the books of the tax receiver is the tax digests, which under the law consist of three copies, one of which is placed in the hands of the State Revenue Commissioner, another in the possession of the tax collector and the other in the hands of the ordinary or board of county commissioners, all of which must be done before August 1 of each year. Therefore in August neither of these books is in the custody of the tax receiver, and the jury commissioners are authorized to use either of these three digests." Hence, although the tax

commissioner swore that he did not furnish the list of names, he has no authority to do so. There is no evidence that the names of the jurors placed in the jury box were not taken by the jury commissioners from one of the digests prepared by the tax commissioner in his capacity as tax receiver. The ground is without merit. See, in this connection, Davis v. Arthur, 139 Ga. 74 (5).

(e) It is not error for the judge in his discretion to refuse to permit the defendant to propound questions other than those embraced in the statute in order to further test the qualifications of jurors. Dumas v. State, 63 Ga. 601; Simmons v. State, 73 Ga. 609 (54 Am. R. 885); Lindsay v. State, 138 Ga. 818 (76 S. E. 369).

2. The Code, § 27-2201, provides as follows: "After the testimony shall have been closed on both sides, the State's counsel shall open and conclude the argument to the jury, except that, if the defendant shall introduce no testimony, his counsel shall open and conclude after the testimony on the part of the State is closed." Where the defendant has introduced evidence in his own behalf, the fact that he may admit the homicide and seek to prove justification does not entitle him to open and conclude the argument. Mize v. State, 135 Ga. 291 (2).

3. Ground seven of the motion for new trial complains that the court refused to grant the defendant's motions for a mistrial on account of alleged inflammatory remarks of the solicitor-general in the presence of the jury. In order to deal with the points, it is necessary to embrace from the record that ground of the motion which is as follows: "During the progress of the trial, and in the presence of the jury, the following colloquy took place among State's counsel, attorneys for the defendant, and the court, relating to the reading into the record before the jury of a transcript of the testimony of a witness, Sylvester Hardwick, given on a former trial, the witness being alleged to be inaccessible at the time:

"Mr. Parker: Now, may it please your Honor, in the light of the showing that has already been made by the

sheriff, it appears that Sylvester Hardwick, who has testified before in a previous trial of this case, is inaccessible; he lives in another State, and of course we cannot force him by an ordinary subpoena to come into this jurisdiction. It appears also from the sheriff's testimony that he has made all reasonable and diligent efforts, including the trip that he went to Jacksonville, together with counsel for defendant and myself, in an effort to find the witness and persuade him to come to court if possible. I want to state in my place that I have done all that I know to do. I went personally and got from the clerk here two subpoenas, and the sheriff, of course, got them and mailed them to me, and I mailed one of them to his last known address, 636½ Ashley Street, as I recall it, and it didn't come back. It was mailed by me personally, after being countersigned by the solicitor, and after statement that his expenses would be paid.

"The Court: And the proper postage attached?

"Mr. Parker: Yes, and another letter was mailed with another subpoena, addressed to general delivery, Jacksonville, Florida, and neither of those letters have been returned, so far as I know, to my office; and that was some two weeks or more ago—ten days ago, at least—and I know of nothing else that the State could have done to procure the attendance of this witness. We have shown by the reporter that this is the transcript, and we now tender the evidence of Sylvester Hardwick given on the previous trial of this case.

"The Court: Any objection?

"Mr. Moore: Yes, I will have to state in my place—it is already in the record, but I restate it—in objection to the allowance of the evidence, which is this: We stated a moment ago that we have no counter-showing to the showing that they have made. This is, in effect, counter to the showing, for we—for the defendant—were diligent, too. I concede that maybe our diligence inures to the benefit of the State's diligence if it had gone far enough. The defendant contended at all times, at the last trial and at all times since, that the negro was a perjurer. I participated in the negotiations to get him back, and importuned

the solicitor-General to agree that he come back and testify; that he not be subjected to punishment; that the defendant nor his counsel, nor any person connected with the defendant, would see or talk to him; if the sheriff or solicitor-general would give him safe conduct, it would be all right with us, notwithstanding we knew he was a perjurer. Mr. Parker declined to agree not to prosecute him if he told a different story, or if he told a story that he thought was untrue when he came back, and the same thing was true at the outset in this case. Your Honor will remember, and I want it a part of the record, that I solicited you and Mr. Parker together in the room in the rear of the judge's stand to assist us in getting the witness back, and it was at Mr. Parker's suggestion, as I recall, that we repaired to the sheriff's office. I think maybe Your Honor left us there, and we had overlooked Mr. Sapp, but he came in and we talked there and agreed, at Mr. Parker's suggestion, that we try to get him to come back, and go down and tell him that both sides wanted him to tell the truth and come back and testify; but, even so, Mr. Parker said he would not agree to immunize him from prosecution if, in his opinion, the negro was guilty of perjury. When we were unable to get the negro to come back by negotiation, we were willing to have him come back here as mad as blazes, just so he would testify. We got warrants and got the negro in jail, and Mr. Parker declined to participate in the extradition which the negro was demanding. Now, that is the diligence; and when the matter was mentioned to Mr. Parker (I state in my place too) about indicting the negro here, he said he would not present the bill. They had the negro in jail, and he could have been extradited by the State, and had him here, and we wouldn't care how mad he was, just so we had him here.

"Mr. Parker: May I say one word further? May it please Your Honor, I will say to the Court and to counsel now, that as long as I am solicitor-general I am not going to let a defendant tell me who to prosecute for perjury and who not to prosecute. I will go a step farther and say that if this negro was testifying for Mr. Cady, and I thought he was a perjurer, as I don't think in this case, I would

not indict him before a grand jury of Coffee County while Mr. Cady's case was pending and undisposed of in the court. Now, that is my position flatfootedly with respect to the perjury. Counsel did approach me and ask if I would join in a requisition proceeding to bring him back on a charge of perjury. I told them, no; before I could join in any such proceeding I would have to file a petition addressed to the Governor, and state that he was charged with perjury, and in my opinion was guilty of perjury; and I can't make any such statement to the Governor of this State or to the Governor of Florida. I told them further that if the tables were reversed, and if the darkey were swearing for Mr. Cady, I would not join in any proceeding to indict him for perjury pending the disposition of the case. I don't think it would be fair to a defendant while his case is still on the docket undisposed of to go before a grand jury and indict a material witness for a defendant for the offense of perjury, and thus cast a cloud over his testimony; and I don't think it is fair, on the other hand, for the State to do it where he is a material witness for the State.

"I will state with respect to the matter of immunity that when counsel first approached me with respect to going to Jacksonville and promising the darkey immunity, that is, that he would not be prosecuted if he came back to this court, no matter what he testified, I told counsel that I would not bargain with a witness on any such basis; that if the witness came back and told substantially what he had heretofore told, that, of course, there would be no effort to indict him; but that I wasn't going to promise a witness immunity from the processes of the law, and prosecution at the hands of the law, regardless of what he might swear in the trial of the case—a murder charge of that type in this county; and I am going to stick to that proposition. I wouldn't do it in this case, and I wouldn't do it in any other case. I don't bargain with witnesses in advance of trials and promise immunity as to what they may testify respecting the truth of a transaction. I might say further that I don't know whether the darkey would have come back or not. He didn't come at the March term. We tried to

get him at the March term, and were unable to do it. He was scared to death while he was here. He was kept in jail four or five months as a material witness before the first trial, under the orders of the coroner, and for his own protection; and I don't blame him, personally, if he doesn't come back. I will say that in behalf of the witness; but, certainly, after these gentlemen had taken a perjury warrant charging him with perjury, and undertake to prosecute him for perjury, he would be a plain fool had he come back voluntarily to the very court in which he was going to have to face a prosecution for perjury. I made that statement to those gentlemen. I told them that if we had any hope of getting him back, we certainly wouldn't get him if they had him arrested on a perjury warrant; that, if he had any sense at all, he certainly wouldn't come back freely and voluntarily and willingly to court to be subjected immediately to a prosecution for perjury. Now, I hope I have made my position clear to the court with respect to the matter. I think it is a reasonable position. It is my position nevertheless, and I think the court should have it in view of what counsel has stated in his place.

"Moore: If the court please, will you retire the jury? I want to make a motion at this time.

"The Court: All right, let the jury retire." (The jury retired from the court room.)

"Mr. Moore: Now, if the court pleases, in view of the rather extensive and inflamed remarks of the solicitor-general, the repetition of which I do not deem necessary here, in view of the fact that they have just been made in the presence of the court and jury, I ask the court at this time for a mistrial in this case, because the statements of the solicitor could have no other effect on the minds of the jury in this case, in my opinion and in my belief, than to have prejudiced their minds to the definite detriment of the defendant, and to imperil his chances of securing an impartial trial.

"The Court: Don't you think it was in response to the statement you made?

"Mr. Moore: It may have been aimed at a response, if the court please, but it was an oratorical outburst.

"Mr. Parker: I want to make one correction, may it please Your Honor. I didn't tell Judge Grantham that if the tables were reversed, but I did make that statement to Mr. Moore. He is the man I had in mind when I said I told counsel for the defendant. Here is what happened with Judge Grantham: On Monday of last week, I believe Mr. Moore was out, and Judge Grantham asked me if I would lend my name for use on an extradition proceeding, and I told him, no. Later in the day—I don't know whether it was Monday or Tuesday—he came to the grand-jury room where I was serving the grand jury, and said, 'I have a request to make of you.' I said, 'All right, what is it?' That was in the solicitor's room. He says, 'I want to bring Mrs. Cady over here, and I want you to draw an indictment for perjury against this negro.' He may have called his name. If he didn't, I understood who he meant. And he said, 'I want it presented to this grand jury.' I said, 'No, I won't do that.' He said, 'Well, you don't blame me for asking it?' I said, 'No,' and got up and walked out. Isn't that what happened?

"Thereupon, counsel for the defendant then and there moved the court for a mistrial in the case because of the statements of the solicitor above quoted, and for the reason that such remarks could have no other effect on the minds of the jury in the case than to prejudice their minds to the definite detriment of the defendant, and to imperil his chances of securing an impartial trial, which motion the court then and there overruled, and denied a mistrial, which judgment refusing a mistrial was adverse to the defendant, was against the principles of justice, and was harmful error."

We can see nothing in the remarks of the solicitor which is in any way improper or inflammatory in character, and nothing which would prejudice the rights of the defendant. The motion does not, in fact, indicate how or why such could be true. Therefore the ground is without merit.

4. The Code, § 38-1604, is as follows: "Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except

that either shall be competent, but not compellable, to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife shall be a competent witness to testify for or against her husband in cases of abandonment of his child, as provided in section 74-9902." The constitutionality of this provision of the Code was adjudicated in *Melton* v. *State,* 180 Ga. 104, where it was said: "Under the statute law of this State, a wife is incompetent to testify either for or against her husband on his trial for the offense of murder. The statute embodying this rule is not invalid as being unreasonable or contrary to public policy, or as violating either the due-process or the equal-protection clause of the State or Federal constitution." Accordingly, the ninth ground of the motion for new trial is without merit.

5. The movant complains that the court erred in not granting a mistrial on account of the method of examination by State's counsel of certain witnesses for the defendant, whereby, as alleged, the "character" of the defendant (whether good or bad not stated) was injected into the case. About sixteen pages of typewritten questions and answers are embodied in the motion, for the purpose of showing that such was the effect of the prolonged interrogation. At the conclusion of this line of interrogation, the motion for mistrial was made. While we do not think that the exception is well taken on its merits, we rest our decision on the ground that the defendant should not be permitted to tacitly acquiesce by his silence throughout the course of this prolonged line of questioning, and then make the contention that such an extended line of interrogation had the general effect of putting the defendant's character in issue and was therefore harmful to the extent that a mistrial should be declared.

6. The eleventh ground of the motion is as follows: "Because, during the progress of the trial, John Ricketson, a witness for the State, was permitted to testify as follows: 'After we got through with the inquest me and the sheriff went over there [to the jail]. I didn't have any conversation

with him [Eurus Cady, the defendant]. The sheriff and the patrolman was talking with him. There was a patrolman with us. Mrs. Cady, his wife, was also present. Some of them mentioned the wrench—I don't remember now who it was, but his wife spoke up and says, 'I can tell you exactly how come the wrench there—I carried it there myself.' " This evidence was admitted over objection, not on the theory that what the wife said would have any probative value, but because her statement was made in the presence of the defendant who made no denial or response thereto, although contrary to what he now asserts and contends. This proposition of law seems to have been fully dealt with and decided by this court adversely to the movant, in Odum v. State, 183 Ga. 854, where a number of previous cases are cited, and therefore the ground is without merit.

7. The defendant's statement on a former trial is admissible against him. Dumas v. State, 63 Ga. 600 (2). Accordingly, the judge did not err in admitting in evidence a transcript of the defendant's statement made at a former trial.

8. Complaint is made that the court refused to charge the following request: "If you find that the defendant, Eurus Cady, killed the deceased, Tom Burden, as a result of a fight in which the defendant, Eurus Cady, and the deceased, Tom Burden, both intended to take part, and that in the passion engendered in the defendant, Eurus Cady, by such a fight, had not had a sufficient time to cool or that no sufficient cooling time has intervened, then such killing would by involuntary manslaughter." The defense of involuntary manslaughter does not appear to have been in any wise involved in this case. If what was really meant was "voluntary manslaughter," that law was fully and correctly charged.

9. A charge on impeachment is not required, in the absence of a timely written request. See the Code, § 38-1806, and citations in Ga. Code Ann., § 38-1806, p. 675. Accordingly, the ground of the motion which complains that the court failed, on its own motion, to charge as to the impeachment of witnesses, particularly the Code, § 38-1803, dealing

with impeachment on account of "contradictory statements previously made," is without merit.

10. The movant complains "because the court erred in failing as a part of his instructions to the jury to state the contentions of the defendant, after having stated the contentions of the State; movant averring that no reference whatever is made to the contentions of the defendant, save and except in the paragraph: 'The contentions of the State as set out and alleged in the indictment, and the defendant's plea of not guilty, make the issue which you are called upon to try and determine in this case.'" We think this ground without merit. Near the beginning of the instructions, the court charged: "If you find that the deceased was the aggressor without sufficient provocation, and you also find that there was a great discrepancy or inequality in the strength of the parties on account of their physical condition, and the defendant was unable to defend himself without the use of a weapon, and he used the weapon in self-defense, and did not act beyond the apparent danger, if any, then it would be your duty to acquit the defendant. In other words, if at the time the shot was fired the person who did the shooting had well-founded reasons, as a reasonable, courageous man, to believe himself in imminent peril of a felony being inflicted upon him, without fault on his part, produced the exigency to shoot, then such killing would not be murder."

11. The movant excepts to the refusal of the court to charge the following request: "If you disbelieve the evidence of Sylvester Hardwick, the negro, whose testimony on a former trial was read in your hearing, then I charge you that the testimony in this case would be circumstantial evidence, and in that event you will acquit the defendant, Eurus Cady, and return a verdict of not guilty, unless you go further and find to a moral and legal certainty and beyond a reasonable doubt that the circumstances as proven were such as to exclude every reasonable hypothesis save the hypothesis of guilt. By hypothesis is meant a real condition taken as a basis for inference or a ground from which to draw conclusions." While the defendant, who had at-

tacked the evidence of this witness, had the privilege to request, if he chose, and thus obtain a charge on the law of impeachment, this he failed to do; and it would seem to overemphasize this attack to expect the court to charge the status of the case on a mere assumption that the jury would disbelieve the testimony of this witness; and besides, even were the jury to wholly reject the evidence of this witness, the case would not be one of circumstantial evidence only, since the defendant admitted the fact of killing. Moreover, it is the law that where a homicide is shown to have been committed by the defendant, or as in this case is admitted by him, a legal presumption of malice arises, and it devolves upon the defendant to exculpate himself from the crime and guilt of murder by showing justification, mitigation, or excuse, unless it be that his statement admitting the killing or the State's evidence showing it, or the surrounding facts and circumstances connected with such evidence or admission, should themselves tend to justify or mitigate the homicide. Mann v. State, 124 Ga. 760; Turner v. State. 139 Ga. 593 (3); O'Pry v. State, 142 Ga. 600; Mattox v. State, 181 Ga. 361 (4); Thompson v. State, 191 Ga. 222 (7), 223. The charge requested, as an abstract principle of law, does not seem to be in harmony with the rule just stated, since an instruction such as requested would necessarily impose upon the State the unwarranted burden of showing to a moral and legal certainty that an admitted or proven homicide was without palliation, excuse, or justification, even though the admission or testimony proving the killing failed to justify or mitigate it, whereas in that event no such duty would devolve upon the State. In any event, and irrespective as to what had or had not been shown with respect to justification or palliation, since these are matters solely for the jury, and concerning which the court is forbidden to express an opinion, the requested charge would need to set forth an abstractedly correct principle of law. The ground is without merit.

12. Exception is taken to the following excerpt from the charge: "Justifiable homicide is the killing of a human being in self-defense, or in defense of one's person, against one who manifestly intends or endeavors, by violence or sur-

prise, to commit a felony upon such person." The ground of complaint is that the legal definition of justifiable homicide is embodied in the Code, § 26-1011, and therefore the portion charged is a misstatement as being incomplete. The full section is as follows: "There being no rational distinction between excusable and justifiable homicide, it shall no longer exist. Justifiable homicide is the killing of a human being by commandment of the law in execution of public justice, by permission of the law in advancement of justice; in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; or against any persons who manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person, dwelling, or being therein." The defendant further contends that the abbreviated charge omitting portions of this section deprived him of one of his defenses, to wit, the protection of his wife, upon whom, it is contended, a felony was about to be committed. It is not error for the judge to fail to charge the law of justifiable homicide in the abstract terms of the Penal Code, provided he correctly applies those provisions to the facts and contentions as made by the defendant in the trial of the case. Wilder v. State, 148 Ga. 270 (3). This the judge did in the case before us, by the excerpt complained of, in so far as self-defense was involved and concerning which he was addressing himself when the excerpt was charged. In another portion of the charge the other ground of defense referred to in this motion was fully and fairly stated.

13. Ground eighteen of the motion for new trial complains that the court failed to give in charge "the rule of decision," that is, failed to instruct the jury that they were the judges of both the law and facts, the facts as adduced on the trial and the law as given them in charge by the court. This complaint has been several times determined by this court adversely to the movant. In Webb v. State, 149 Ga. 211 (2), it was held: "The court did not err in failing to instruct the jury that they were judges of the law and the facts," citing numerous cases.

14. The movant excepts to the failure to charge the law of mutual combat, asserting that, under the facts of this case, it was error to fail to do so, with or without a request, even though the court had charged the general law of voluntary manslaughter. The cases of Shafer v. State, 191 Ga. 722, Bailey v. State, 148 Ga. 401, Ison v. State, 154 Ga. 408, are cited by the movant. It will be observed that no exception is taken to any erroneous or misleading charge with reference to this subject-matter, but only to an absence of any instructions thereon. It appears from the record that the court did in fact charge the jury on the subject of mutual combat in language as follows: "If the State has proven to you, to a moral and legal certainty and beyond a reasonable doubt, that the defendant, Eurus Cady, killed the deceased, Tom Burden, either in the heat of passion, or while the defendant, Eurus Cady, and the deceased, Tom Burden, were engaged in mutual combat, in acting under the fears of a reasonable man that a felonious assault was being or about to be made on him or on his wife, then your verdict would be guilty of voluntary manslaughter. Whether or not this charge might be subjected to criticism, is a question not raised by the exception. For a recent discussion of the propriety or necessity of a charge on mutual combat, see Fulwood v. State, 68 Ga. App. 183, 185.

15. Complaint is made because the court, over objection, permitted State's counsel to read into evidence a transcript of the evidence of the witness, Sylvester Hardwick, who had testified at a previous trial of the case, and who was shown to be a resident of Jacksonville, Florida, but not present in court. The transcript was identified by the reporter as substantially a correct transcript of all the evidence of the witness in that former trial. Reference is made to division three of this opinion for a better understanding of this ground. It appears that the material witness had refused to return to the State and again testify in the case. In Smith v. State, 147 Ga. 689, this court held: "The testimony of a witness who was examined on a former trial of a criminal charge, where opportunity for cross-examination was afforded, is admissible in evidence on a subsequent trial of the same defendant upon the same charge, upon proof

that the witness has removed from the State and has refuse to return and testify in the case." The mere averment se forth in this ground that his previous confinement as a ma terial witness amounted to coercion to such an extent as t render the truth of his testimony improbable, does not pre sent a meritorious ground of complaint. Nor does the fac that this ground of the motion shows that his testimony wa under attack as being subject to a previous contradictor statement, afford a good ground of complaint.

16. No harm could have been perpetrated on the defend ant by the following charge: "To this indictment the de fendant has entered his plea of not guilty, and by his plea o not guilty he denies all the material allegations of the indict ment, and places on the State the burden of proving all th material allegations of the indictment to your satisfactio to a moral and reasonable certainty and beyond any reason able doubt." Even though the defendant had admitted th killing, the failure of the court to except this allegation fro those which the State was *otherwise* required to prove, wa not a matter of which he could rightly complain. The sam can be said of the exception to the charge that: "The de fendant enters upon the trial of the case with the presump tion of innocence in his favor, and that presumption remain with him until and unless the State shall overcome and re move it by the introduction of testimony in your presenc and hearing sufficient to convince your minds beyond a rea sonable doubt of the guilt of the defendant."

17. Grounds twenty-three and twenty-four of the motio attack the verdict for the reason that one of the jurors wa related within the sixth degree, as computed by the civi law, to one N. E. Holton who, although not entered as such it is alleged was in effect a voluntary prosecutor in the cas "by reason of the payment by him to one C. D. Brooks of th sum of seventy-five dollars, by voucher No. 1817, issued fo the disbursement of general funds of Coffee County Georgia, said payment having been made by the said N. E Holton without authority previously granted by the boar of county commissioners of said county, without any au thorization by the superior court of said county, and not a legitimate, contingent expense authorized by law or other

wise;" also because said Holton as commissioner paid the sum of $10 to a photographer for pictures made of the body of the deceased, to be used in the case against the defendant; and also because another named juror was thus related to Arthur Vickers, who as "adviser" to the board of commissioners made the payments indicated. It is averred that the movant had no knowledge, and by the exercise of ordinary diligence could not have known, of said payments or of said relationships before or during said trial. Pretermitting any discussion or ruling on the question of whether or not the assignment of error in the bill of exceptions, in so far as these two last-named grounds of the motion be sufficient, in that the exception is merely general and fails to set forth any abuse of discretion in determining the questions of both law and fact (see Eubanks v. Griffin Investment Co., 162 Ga. 717, and cit.), we think that neither of these grounds is meritorious. Even if the language employed as to the payments indicated could be taken as sufficient to show that the parties making them thereby assumed the status of prosecutors, the judge was authorized to find that one of the defendant's attorneys of record knew of such payments, and that the other attorney knew of Holton's relationship to the juror. As to the relationship to Vickers, who was merely an "advisor" of the commissioners and without any sort of authority, the relationship of prosecutor could in no event be inferred.

18. We have considered and dealt with each of the grounds of the motion, which the capable and diligent counsel for the defendant have presented and argued, and on a consideration thereof, together with the well-prepared brief for the State, we find no error such as would justify setting aside the verdict of the jury.

Judgment affirmed. All the Justices concur.